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ALEXANDER L. STEVAS

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.

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Respondents avoid asking this Court to endorse the unprecedented theory of administrative law proclaimed by the court of appeals. Instead of defending the decision below, they urge this Court itself to review and set aside findings of the National Highway Traffic Safety Admin-

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* A list of parent companies, subsidiaries, and affiliates of the foregoing petitioners is set forth in the Appendices to Petition for Writ of Certiorari in No. 82-354 ("App.") at App. 172a-176a.

istration ("NHTSA") that the court of appeals accepted. They also ask this Court to declare that NHTSA's decision not to mandate the installation of passive restraints was unlawful under the Safety Act, a determination that the court of appeals declined to make. Alternatively, respondents urge this Court to reject NHTSA's reasons for exercising its discretion not to amend Standard 208 to prohibit manufacturers from complying with the standard by installing "detachable" passive belts. None of these invitations should be accepted. Rather, this Court should reverse the judgment below and uphold the agency's decision.

I. THE JUDGMENT BELOW MUST BE REVERSED; AS RESPONDENTS ESSENTIALLY CONCEDE, IT IS UNSUPPORTABLE.

Respondent State Farm does not defend two critical holdings of the court of appeals: (1) the agency could not lawfully rescind the passive restraint requirement on its finding of substantial uncertainty that the rule would significantly increase restraint system usage rates,[1] and (2) the burden of proof was on the agency to prove that passive belts would not significantly increase usage rates, rather than with those asserting that they would.[2] *See*

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[1] The court of appeals held:

> "There may well be 'substantial uncertainty' about the seatbelt usage rates that can be predicted if detachable belts are widely used . . . . If, as NHTSA contends, the passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, then only a well justified refusal to seek more evidence could render rescission non-arbitrary . . . . The agency . . . rested its decision only on 'substantial uncertainty' about these rates. Its decision to rescind the standard was thus arbitrary because the decision was supported by no record evidence whatsoever." App. 51a-54a.

[2] In the court of appeals' view, "the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not." App. 51a. *See also* App. 31a n.10.

State Farm Br. 12-13, 38.[3] Respondents, unlike the court below, also recognize that NHTSA's rescission order could not have been held "arbitrary and capricious" by reference to equivocal legislative debates and votes relating to the merits and demerits of passive restraints that occurred years after passage of the Safety Act, and that do not "carr[y] the weight of positive law" (App. 46a). *See* State Farm Br. 13, 37 n.18; NAII Br. 45. On these questions presented in the petitions for certiorari, respondents appear to have little if any disagreement with petitioners. *See* State Farm Br. 13.

Instead, respondents suggest that *this* Court should function as the "reviewing court" under the Safety Act.[4] They urge this Court to hold what the court of appeals declined to hold—that the agency's "finding of 'substantial uncertainty' regarding the usage rates of detachables was . . . arbitrary and capricious." State Farm Br. 38, 34-42; NAII Br. 18-27.[5] Indeed, NAII's argument that detachable belts will often be reattached (NAII Br. 25-27) was squarely rejected by the court of appeals,

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[3] The court of appeals now seems to agree. In *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1216 (D.C. Cir. 1983), a panel including two of the three members of the panel below unanimously held that an order rescinding certain of the CAB's nonsmoking rules "is reviewable in the same manner as earlier regulations" imposing those rules. The court did not cite its earlier opinion in this case.

[4] State Farm Br. 39. *See also* NAII Br. 40: "Petitioners' arguments focus solely on the opinion of the court of appeals, not on the lawfulness of the agency action . . . ."

[5] Contrary to respondents' suggestions (State Farm Br. 41 n.42; NAII Br. 44), the court of appeals did not reject NHTSA's findings of substantial uncertainty about usage rates as inaccurate. Instead, the court conceded that "there may well be" such uncertainty, but held that those findings "miss the point." App. 51a, 52a. It was decisive to the court of appeals that NHTSA had not carried the burden placed upon it by the court of proving the negative—that NHTSA *had not demonstrated* that detachable belts could not lead to benefits "that exceed their relatively small costs." App. 51a-52a.

which upheld as "reasonable" NHTSA's finding that, once detached, a detachable belt " 'becomes identical to a manual belt.' " App. 50a (quoting App. 98a). NAII further argues that the judgment below can be justified as required by the terms of the Safety Act (NAII Br. 10-16, 40-44), even though the court of appeals recognized that the rescission was not "in excess of statutory . . . authority." *See* App. 31a (citing 5 U.S.C. § 706(2)(C)). *See also* App. 46a.

Contrary to State Farm's suggestion (State Farm Br. 13), this Court need not and should not accept respondents' invitations to hold NHTSA's decision unlawful on grounds that were not adopted or were specifically rejected by the court of appeals. As the Court has held, it is particularly inappropriate to accept such invitations where the issues raised by the respondents—whether usage rates for detachable passive belts can reliably be predicted from limited data concerning usage rates for more coercive passive belts—are committed by law to the discretion of the factfinder in the first instance. *See United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975).[6] Moreover, in the absence of a cross-petition for certiorari granted by the Court, the Court will not en-

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[6] *Cf. Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (whether state regulations violated federal law); *ICC v. Illinois Central R.R.*, 215 U.S. 452 (1910) (whether ICC order violated Interstate Commerce Act).

Respondents' continued challenges to the agency's findings of substantial uncertainty have a hollow ring, given the business judgments of insurers like State Farm that it would be inappropriate to provide premium discounts to motorists who purchased cars equipped with detachable passive belts. *See* MVMA Br. 19 n.30. As the federal parties demonstrate in their reply brief (U.S. Rep. Br. 13-18), NHTSA's findings of substantial uncertainty about the usage rates that might be achieved with detachable passive belts were clearly reasonable in light of the absence of any comprehensive data concerning such usage rates—other than for systems with ignition interlocks, which Congress has outlawed as a means of compliance.

tertain an argument by the respondents that was not adopted by the court below where that argument would "expand the relief which has been granted" below.[7] NAII's argument that NHTSA had no discretion under the Safety Act not to mandate passive restraints would plainly expand the relief granted by the court below, and should not be entertained. As we now show, the argument is wrong in any event.

II. THE COURT OF APPEALS' HOLDING CANNOT BE JUSTIFIED EITHER BY THE TERMS OF THE SAFETY ACT OR BY THE PRIOR REGULATORY HISTORY OF STANDARD 208.

NAII advances its own theory in support of the judgment below—that substantial uncertainty was an inadequate basis for rescission here, "given *this* statute and *this* record." NAII Br. 41 (emphasis in original). *See also* id. at 10-16, 40-44. This theory depends upon a view of the Safety Act that was not accepted by the court of appeals. The argument both misreads the Safety Act and ignores the regulatory history of the passive restraint provisions of Standard 208.

The Safety Act does not require that the agency promulgate a rule mandating the installation of passive restraints. Although the Act mandates the issuance of "minimum" standards,[8] it requires that those standards be addressed only to "unreasonable risk[s]," [9] and it leaves to NHTSA in the first instance the question of what

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[7] *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *Mills v. Electric Auto-lite Co.*, 396 U.S. 375, 381 n.4 (1970); *Langnes v. Green*, 282 U.S. 531, 538-39 (1931). *See generally* Stern, *When To Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974); 9 Moore's Federal Practice ¶ 204.11[3].

[8] 15 U.S.C. §§ 1391(2), 1392(a).

[9] *Id.* § 1391(1).

particular standards are to be issued.[10] With the single exception of fuel system integrity,[11] the Act does not mandate any particular safety standard, or any particular type of standard, for passenger cars—even though it explicitly does so for schoolbuses. *See* 15 U.S.C. § 1392 (i).[12] Accordingly, NHTSA's earlier decision "to abandon active restraints in favor of passive restraints" was not a requirement of the Safety Act, but an "exercise of

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[10] NAII notes that the Safety Act's requirement of mandatory standards was a change from the original proposal that would merely have authorized the agency to issue standards. NAII Br. 12-13. As the committee reports explained, however, Congress simply determined that there was a "present necessity" to have safety standards, and it left to the discretion of the Secretary what those standards should be and what they should cover so long as the Secretary stayed within the bounds of the statutory requirements that standards be "minimum standard[s] for motor vehicle performance" and be "reasonable, practicable and appropriate." *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 15-16 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 4-7 (1966).

These statutory criteria may well *require* NHTSA to engage in some comparative weighing of the costs and benefits of active and passive restraint requirements. *See H & H Tire Co. v. DOT*, 471 F.2d 350, 353-55 (7th Cir. 1972); *id.* at 356-57 (Stevens, J., concurring). In any event, contrary to NAII's suggestion (NAII Br. 15-16), they clearly *permit* the agency to do so, as the court of appeals recognized. App. 17a.

[11] *See* 15 U.S.C. § 1392 note.

[12] While certainly one of the concerns that led to the Safety Act involved the "second collision" between the occupant and the interior of the vehicle following a crash (*see* NAII Br. 12), Congress also left to the agency's discretion how best to deal with that concern. NHTSA has issued no less than ten different standards designed principally to address that problem—including the current active restraint requirements of Standard 208. *See* 49 C.F.R. §§ 571.201 (instrument panel, seatback, interior compartment door, sun visor, and armrest impact); 571.202 (head restraint protection); 571.203 (steering control system impact); 571.204 (steering control rearward displacement); 571.205 (windshield glazing); 571.207 (seating system stabilization); 571.208 (active seatbelts); 571.209 (seatbelt assemblies); 571.210 (seatbelt assembly anchorage); 571.213 (child restraint systems).

its administrative discretion," [13] and has historically been regarded by the agency as such. *See* MVMA Br. 34 n.63.

The Safety Act also specifically grants NHTSA discretion to "amend or revoke" any safety standard, such as Standard 208. 15 U.S.C. § 1392(e). As the court of appeals recognized (App. 24a-25a), the Act subjects such agency decisions to judicial review under the same provisions of the Administrative Procedure Act applicable to the issuance of safety standards in the first instance. 15 U.S.C. §§ 1392(b), 1394(a). Nothing in the Safety Act justifies the unusual burden-shifting and negative proof requirements imposed by the court of appeals in reviewing NHTSA's rescission action.[14]

NAII alternatively argues that the judgment of the court of appeals should be upheld because of "the agency's complete reversal of direction from a course it had followed for over a decade." NAII Br. 42-44, 45 & n.51.

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[13] *Chrysler Corp. v. DOT*, 472 F.2d 659, 674 (6th Cir. 1972). *See also Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1347 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[14] Amicus American Insurance Association's statutory argument also fails. AIA suggests that this Court should "presum[e]" (AIA Br. 9) that NHTSA's action was based upon criteria other than those identified by the agency and reviewed by the court below, *i.e.*, upon "concern over the depressed economic state of the domestic automobile industry" (*id.* at 5), and that such a concern would have violated the Safety Act. Even if the agency had relied in part on the severe economic plight of the industry, this concern would not have violated the Safety Act, which as noted above requires the agency to consider whether its standards are "reasonable, practicable and appropriate." *See* note 10 *supra*. But as AIA recognizes (AIA Br. 6), the agency's findings do not rely on the industry's plight. This Court has consistently refused to invalidate agency actions based on motivations not reflected in the administrative record, and certainly does not presume the existence of such motivations. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *accord, Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See also United States v. O'Brien*, 391 U.S. 367, 382-84 (1968) (purported motivations of Congress do not render statute unconstitutional).

See also State Farm Br. 11. While this part of NAII's argument (unlike its reliance upon the terms of the Safety Act) was incorporated in the decision below, the argument ignores the zig-zag regulatory history of the passive restraint requirement. As we have noted (MVMA Br. 5-9), the agency established a prospective passive restraint requirement in 1970, had that requirement indefinitely postponed by the Sixth Circuit's *Chrysler* decision in 1972, reproposed passive restraint requirements in 1974, revoked those proposals in favor of active restraints in 1975, extended those active restraint requirements indefinitely pending the Coleman demonstration program in 1977, and cancelled that program two months later.[15]

While NHTSA certainly had a duty in 1981 to explain clearly why it was rescinding the rule promulgated by Secretary Adams,[16] it fully discharged that duty. As it explained, the Adams decision had been based upon critical assumptions about significant increases in predicted usage rates with passive restraints that were no longer valid, and in light of the substantial uncertainty about those predicted usage rates the agency could no longer find that implementing the rule would meet the statutory criteria. The court of appeals imposed upon NHTSA the far different obligation that before it could

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[15] Contrary to NAII's suggestion (NAII Br. 45 n.51), NHTSA's order revoking its passive restraint requirement in 1975 did not indicate that the requirement would be reinstated. Instead, NHTSA extended the active restraint requirements through August 1976 and stated that those provisions "will in all likelihood be in effect for some period" thereafter. 40 Fed. Reg. 33977 (August 13, 1975). Secretary Coleman's later order eliminated *any* termination date so as to extend these active belt requirements "for the indefinite future." 42 Fed. Reg. 5071 (January 27, 1977).

[16] As the court of appeals held on review of the Adams rule, the Secretary must "provid[e] a sufficient explanation why his judgment differed from his predecessor's." *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

rescind a rule in these circumstances the agency had to develop evidence not presently in existence proving that predicted usage rates would not significantly increase. That unprecedented standard of judicial review cannot be permitted to stand.

III. NHTSA'S REJECTION OF AN AMENDMENT TO STANDARD 208 TO REQUIRE THE INSTALLATION OF NONDETACHABLE BELTS WAS NEITHER ARBITRARY NOR CAPRICIOUS.

State Farm's principal argument draws upon the holding of the majority below that it was arbitrary for NHTSA to rescind its prospective passive restraint requirement before evaluating other "obvious" versions of that requirement. App. 72a. The only such version State Farm seriously contends should have been "obvious" was amending Standard 208 to require manufacturers to install nondetachable belt systems.[17] But that was a version

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[17] Amicus American Insurance Association also argues that NHTSA should have "amend[ed] Safety Standard 208 to prescribe the use of air-bags only." AIA Br. 24. This argument goes far beyond what even the majority of the court of appeals held, *i.e.*, that NHTSA "should at least have considered and evaluated the benefits and costs of a standard relying only on airbags before it could rationally rescind Modified Standard 208." App. 64a.

Petitioners have already identified a number of the serious difficulties that would be posed by a mandatory airbag standard. MVMA Br. 39 n.71. These difficulties cannot be swept aside because they were not identified in the agency's decision. AIA Br. 13. The agency never proposed such a standard, and for this reason alone could not have adopted such a standard on this record. Moreover, such a standard would have been a radical departure from NHTSA's prior commitment to—and the Safety Act's requirement of—performance rather than design standards. Indeed, the agency rejected as long ago as 1969 a passive restraint approach relying solely on airbags. *See* MVMA Br. 6 & n.12. Even if the agency could properly have been compelled to consider an airbag-only standard on this record, it was an unlawful invasion of the agency's primary jurisdiction for the majority to mandate that the existing passive restraint requirement be restored while any such consideration was underway. *See Burlington Northern, Inc. v. United States*, 103 S. Ct.

NHTSA did evaluate and reject (App. 109a-110a), even though that alternative was not as "obvious" as State Farm claims. State Farm's argument ignores the agency's specific findings on this point. And its claim that mandating nondetachable belts was an "obvious" regulatory step relies in any event upon the erroneous view that nondetachable belts were "already in service." State Farm Br. 19.

1. The short answer to State Farm's argument is that NHTSA *did* consider and reject the "obvious" step of amending Standard 208 to require manufacturers to install nondetachable belt systems. The agency refused to impose such a requirement for two reasons: the safety need for quick emergency egress in crash situations, and the widespread public fear of being entrapped by fastened belts when an emergency occurs. State Farm's argument is really an effort to transfer the policy discretion conferred by the Safety Act from the agency to the courts, an effort plainly and properly foreclosed by this Court's prior decisions.[18]

Emergency Egress. State Farm denies that the agency has historically favored detachability to ensure emergency egress. It asserts that in 1971 NHTSA "contemplated that a spool release would be used and that detachable belts would be barred." State Farm Br. 33. This argument is disingenuous. As we have shown, this 1971 NHTSA notice of proposed rulemaking was never adopted. The idea of nondetachability met with almost unanimous opposition because of the need for ensuring emergency egress; accordingly, the agency rejected it in 1974 and mandated detachable belts. MVMA Br. 44 &

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514 (1982) (court of appeals may not, in remanding new rate order by ICC, prescribe that effect of remand is to reinstate prior rate).

[18] *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1972). *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 226-28 (1980) (error to overturn agency's consideration of alternatives under express requirement of NEPA simply because of court's own view that environmental factors should have been given "determinative weight").

n.84. It was certainly rational for NHTSA to have concluded that mandating nondetachable belts in all cars would have posed additional safety problems and therefore that such a requirement would not have met "the need for motor vehicle safety," 15 U.S.C. § 1392(a). *See* App. 110a.[19]

Fear of Entrapment. State Farm also disagrees with the record evidence that supports the agency's finding of a fear of entrapment that counselled against requiring nondetachable belts in all passenger cars. State Farm Br. 34 & n.34. But the survey State Farm relies upon found that "scared of being trapped" was the single most frequent explanation given for why most people do not wear seat belts—a factor that 48% of all survey respondents viewed as "very important." R. 1151-52.[20] Another "of the more recent and important studies" identified by NHTSA (R. 81-82) similarly concluded that "fear of entrapment . . . appears to be the most powerful

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[19] General Motors stated at the agency's 1981 hearing that the spool release system "is viable from a safety egress point of view." R. 1225-26. The agency's 1978 order permitting the development of spool release designs, however, recognized the possibility of "problems of emergency occupant egress," and announced the agency's intention to "monitor all new passive belt designs to assure that the release mechanisms are simple to understand and operate." 43 Fed. Reg. 52493, 52494 (November 13, 1978). As we note below, GM never installed a *nondetachable* spool release system in any of its cars.

[20] The 7% figure cited by State Farm represents only those who volunteered such fears in response to the open-ended question, "why is it that so many people do not wear their seatbelts?" R. 1150-51. The actual survey conclusion was that fear of entrapment is "a *latent* explanation for not wearing seat belts" that "is important, but it lurks beneath the surface"—because it is either a fear that is not immediately apparent, "a less socially acceptable reason," or an attitude that "is repressed and avoided." R. 1153 (emphasis in original). Whatever the reason, "it is clear that this 'myth of being trapped' is real, important, and must be dealt with." *Id.*

single attitude that related directly to non-use" of seatbelts. R. 1651. Contrary to State Farm's suggestion (State Farm Br. 34 n.34), fears of entrapment can hardly be presumed to be *greater* for detachable active belts than for nondetachable passive belt systems, which would have been far more coercive. On the basis of these concerns, and in accordance with the requirements of the Safety Act, the agency rationally concluded on the basis of such fears that mandating nondetachable belts would be "counterproductive" and "inappropriate." App. 110a.[21]

2. State Farm insists that the idea of amending Standard 208 to require nondetachable belts was "obvious" because nondetachable belts were "already in service" in VW Rabbits and GM Chevettes and had achieved significant increases in usage rates. State Farm Br. 19. State Farm suggests that NHTSA was obligated to consider such an amendment because of the plans of manufacturers to install "new" detachable belts that State Farm claims were "poorly designed." This purported distinction between "new" detachable belts and "proven"

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[21] Respondents assert that the fear of entrapment is relevant only insofar as it "can affect usage rates." State Farm Br. 35 n.36; NAII Br. 33. As the cited studies show, fear of entrapment clearly does have a significant effect upon usage rates. Moreover, public reaction is also a factor that NHTSA must—and did—consider quite apart from its concern about increased usage rates. *See* App. 22a-24a. As the agency appropriately recognized both in 1977 and 1981, adverse public reaction affects not only usage rates "but also the general public attitude toward related safety initiatives" (App. 107a), threatening a "'poisoning of popular sentiment.'" App. 108a (quoting Coleman Decision). It would also "be difficult to term 'practicable' a system like the ignition interlock that so annoyed motorists that they deactivated it." *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 930 (1979). Requiring nondetachable belts would be a futile exercise if widespread fears of entrapment led to physical destruction of seat belts by large numbers of motorists. *See* MVMA Br. 45 n.88; 44 Fed. Reg. 77210, 77217 (December 31, 1979) (public acceptability of passive belt systems would prevent belt cutting).

nondetachable belts permeates State Farm's brief. *Id.* at 10-11, 19, 20-23, 24, 24 n.24, 25, 26, 28, 38. In fact, detachable belts are not new, and almost all the belts "already in service" that State Farm calls "nondetachable" are actually detachable. The increases in usage rates for these belts result from the use of ignition interlocks and also from the self-selection of those purchasers who voluntarily paid for such systems.

Both active and passive belt systems have traditionally been detachable by a push-button release mechanism, for reasons recognized by NHTSA since 1971 and reiterated by the agency in this case. *See* MVMA Br. 43-45. Detachable passive belts have never been viewed by NHTSA as "poorly designed";[22] indeed, the agency *required* detachability for passive belts as long ago as 1974. *See id.* at 44. Administrator Claybrook recognized in 1979 that the push-button release mechanism of detachable passive belt systems "is important for exit purposes in emergency situations."[23] And a July 1980 report by NHTSA specifically endorsed as an "encouraging . . . feature" the detachable passive belt design developed by Irvin Indus-

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[22] State Farm notes that a NHTSA document describes certain detachable belt systems as "poorly designed." State Farm Br. 25. This statement was that certain systems "have been poorly designed *and* include a detachable feature." R. 2548 (emphasis supplied). The source of this comment was Ford Motor Co., and the reference was to more coercive belt systems, designs which Ford and others believed would have adverse effects on usage rates. *See Automatic Crash Protection Standards: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 41-43 (1981). *See also* R. 1418-19. As Administrator Peck explained in connection with this remark, "We did not and have not characterized a particular . . . design as poor." Tr. of Hearing, August 5, 1981, at 24-25.

[23] *NHTSA—Authorization and Oversight: Hearings on H.R. 2585 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 13 (1979).

tries that was ultimately selected to be installed by a number of manufacturers. R. 1629.[24]

Nondetachable belts, on the other hand, were *prohibited* by NHTSA until November 1978. At that time, the agency granted a petition by General Motors to permit manufacturers to "experiment" in the development of a spool release belt that would play out in an emergency, so that it could be test marketed to determine its acceptability to new car customers.[25] As State Farm itself recognizes (State Farm Br. 6 n.6), however, the three-point passive belt ultimately installed by GM in certain of its 1980 Chevettes was *not* a nondetachable system. While the three-point passive belts on these 1980 Chevettes can be played out from their stored position, they can also be detached by a conventional pushbutton release mechanism located on the belt where it attaches to the bottom of the door.[26] Once detached, these belts must be manually reattached to become effective passive belts.

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[24] State Farm lifts from its context NHTSA's observation that in April 1981 "there are no detachable systems currently available" (R. 107), suggesting that this meant that there were many nondetachable systems "currently available." State Farm Br. 24 n.24. All NHTSA was saying here was that no cars then in current production were equipped with detachable passive belts (other than those equipped with interlocks), and thus that predicting usage rates in advance was extremely difficult. As we show below, there were hardly any nondetachable passive belt cars then in service, either.

[25] 43 Fed. Reg. 52493 (November 13, 1978). GM's petition sought to "facilitate a more complete evaluation of such alternatives prior to the effective dates of the passive restraint mandate," and particularly to permit greater "insight into the question of acceptance by seat belt *users*." R. 2561 (emphasis in original). GM's concerns about public acceptability of coercive belt designs proved to be well founded based upon the results of its experiment. *See* note 29 *infra*.

[26] This push-button release mechanism is depicted in the illustration of the 1980 Chevette system reprinted as an appendix to NAII's brief. *See* NAII Br. App. 2a.

Toyota is the only manufacturer that has ever actually sold nondetachable belt systems following NHTSA's November 1978 order first permitting such systems. Toyota installed a sophisticated and expensive *shoulder* belt spool release system, driven by an electric motor, as an option on "a small number" of 1980 Corona sedans, and later as standard equipment for the shoulder belt on its more expensive 1981 Cressida. R. 304, 1628.[27] The record before the agency does not indicate how many consumers had bought these nondetachable Toyota shoulder belt systems (*see* App. 18a n.12; R. 85), but it was certainly quite low.[28] Toyota's own survey of prospective customers led it to conclude that "even with this sophisticated system we are achieving a disappointing level of public acceptance."[29]

Other "nondetachable" belt systems State Farm describes as "already in service" are actually the 358,000 VW Rabbits and GM Chevettes that, as the court of appeals noted, came "equipped with *detachable* passive seatbelts that were guarded by an ignition interlock." App. 18a n.12 (emphasis supplied); *see also* State Farm Br. 6, 20. These ignition-interlocked systems may be "practically" nondetachable (State Farm Br. 20), because of the

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[27] Even the Toyota system contains a push-button release for the separate active lap belt portion of the system. *See* R. 304, 1628; NHTSA, Automobile Occupant Crash Protection, Progress Report No. 3, July 1980, at 28.

[28] NHTSA's principal survey contractor, Opinion Research Corporation, was unable to find "[a] sufficient number of Toyota owners [with automatic restraint systems] for sampling purposes during the data collection period." R. 1002.

[29] R. 305. GM also found "substantial consumer resistance" even to its *detachable* spool-type system. R. 1441. The 1980 Chevette was the first (and the only) GM car equipped with this system. Less than 13,000 of GM's 415,000 1980 Chevettes (*i.e.*, 3%) were ever ordered with this feature, even though GM offered it to most customers at no additional cost, offered a $25 per car bonus to salesmen who persuaded customers to accept it, and spent over $1 million in advertising and marketing the system. R. 403; *see* App. 18a n.12.

use-inducing effects of interlocks.[30] NHTSA did not consider mandating such *detachable* but ignition-interlocked systems "already in service" in these Rabbits and Chevettes because, as NHTSA expressly recognized (App. 109a), Congress had clearly prohibited it in the 1974 amendments from issuing any such occupant restraint standard.[31]

3. Given the agency's longstanding commitment to detachable passive belt designs and the virtual nonexistence

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[30] As NHTSA found, even the usage rates evidenced in these interlock-equipped cars—like those for the spool-type systems—were skewed upwards, because of the self-selection bias associated with the owners of such systems. Many if not most of these purchasers requested the installation of their passive belt systems. R. 1020 (1980 model survey). *See also* R. 930 (1978 and 1979 model survey). And regardless of whether they knew in advance that they were buying passive belts, "[h]aving voluntarily invested in automatic restraints, [these purchasers] are more likely to use those restraints than someone who is compelled to buy them." App. 98a. The existence of such a self-selection bias was supported both by comments in the record (R. 1716, 1721) and by the agency's own prior judgment. *See DOT and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 523 (1977) (Administrator Gregory): "[I]t must be remembered that purchasers made the choice to begin with, so the results are not very surprising."

[31] In the 1974 amendments, Congress proscribed any passive restraint standard that required or even permitted compliance by means of an interlock. 15 U.S.C. § 1410b(b)(1).

State Farm's assertion that NHTSA "concedes" that nondetachable systems would provide substantial safety benefits (State Farm Br. 20-23) refers principally to these detachable, interlock-equipped systems. *Id.* at 21. Petitioners join with respondents in deploring the tragic losses of life associated with the public's failure to use the active seatbelts now installed in virtually all passenger cars. Respondents' repeated assertions about the life-saving effects of passive belts, however, are premised upon the belt usage rates associated with these interlock-equipped systems that Congress has forbidden NHTSA from requiring. NHTSA has found, and the court of appeals has not disagreed, that no such usage rates can be predicted for detachable passive belts without such coercive features as interlocks.

of any truly nondetachable passive belt systems "already in service," prohibiting detachable belts was hardly a "logical outgrowth" of the agency's order proposing rescission. State Farm Br. 29. Nor was it "fully ventilated in the rulemaking." *Id.* at 30 & n.30.[32] But regardless of whether NHTSA was permitted to prohibit detachability in this proceeding, State Farm has failed to explain why it was ever obligated to do so.

As we have demonstrated, administrative agencies ordinarily have no obligation to propose rules or alternatives to existing rules. MVMA Br. 40-41.[33] State Farm

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[32] In fact, the agency's summary of "major comments" reflects no comments addressed to this issue. App. 121a-129a. State Farm's own comments urged that if the agency was concerned about usage rates for detachable systems, it analyze that issue "over the 1980-86 period":

> "If certain designs do not achieve a satisfactory rate of increased usage, the agency can *later* consider such additional steps as are necessary to ensure that the safety objectives of the Act are met. Such steps might include specific performance requirements that would minimize belt disconnection." R. 478 (emphasis supplied).

The manufacturers certainly were not apprised of the speculative possibility that the agency would ban detachable belts, a step that would have reversed the agency's long-standing endorsement of detachable belt systems. Their comments would have been critical to the issue, since amending Standard 208 to require installation of nondetachable belts would have forced them to redesign their assemblies. *See* MVMA Br. App. 40, 131, 134.

[33] In 1982, Congress considered (but did not adopt) amendments to the Administrative Procedure Act that would have required a description and discussion of alternatives to regulatory actions proposed by the agencies. S. 1080, 97th Cong., 2d Sess. §§ 3-4 (1982). The existing provisions of the APA, however, do not impose such a requirement. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45, 551 (1978). State Farm attempts to distinguish *Vermont Yankee* by asserting that the idea of mandating—as opposed to permitting—nondetachable belts "was neither novel nor complex." State Farm Br. 28. As we have shown above, however, this argument turns upon the totally erroneous premise that these "were the only kinds of passive [belts] that had been previously used." *Id.*

appears to concede this point, but replies that its proposed amendment of Standard 208 did not "address a new program" but would have "plug[ged] a loophole in [NHTSA's] existing program." State Farm Br. 28. This is the real nub of State Farm's position, and it begs the issue, because there is no loophole to be closed. This is not a case where failing to close a "loophole" or otherwise to consider a course of action would violate some statutory policy. *Cf. Pillai v. CAB*, 485 F.2d 1018, 1019 (D.C. Cir. 1973).[34] As we have shown, there is no congressional "mandate" for passive restraints that can be drawn either from the Safety Act itself or from the post-enactment legislative debates.[35] To say that amending the regulation is necessary to close a "loophole" presupposes a mandate for passive restraints that Congress has never established.

The majority noted below that NHTSA cannot function "as an umpire blandly calling balls and strikes," and that "[i]f NHTSA did not believe the standard as written would fulfill the standard's goals, its foremost obligation was to consider whether an amended standard could." App.

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[34] In *Pillai*, Congress had specifically provided the CAB with an alternative to endorsement of international ratemaking by carrier traffic conference agreements, *i.e.*, suspension of tariffs filed by foreign carriers to force bilateral negotiations with foreign aviation authorities. 485 F.2d at 1028-29. By ignoring this statutory tool, "the CAB did not actually or rationally choose among the possible alternatives, *as contemplated by Congress*." *Id.* at 1029 (emphasis supplied).

[35] *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), in which this Court held that the ICC had acted arbitrarily in remedying disruptions in service (resulting from union practices that violated federal labor law) by licensing additional carriers, without considering whether to impose cease-and-desist orders upon existing carriers. The ICC had therefore not only failed to remedy refusals to accept traffic that were "illegal and discriminatory" under the Interstate Commerce Act, *id.* at 166, but also may have "contravene[d] the national policy as to . . . labor relations" reflected in the "hot cargo" prohibitions of the National Labor Relations Act. *Id.* at 172-74.

56a. This presumption in favor of regulation in some form or another permeates the decision below. It fundamentally misperceives both the agency's "obligation" under the terms of the Safety Act and the proper role of the reviewing court. NHTSA's "obligation" is to issue, amend, and when appropriate rescind federal motor vehicle safety standards pursuant to the broad statutory criteria outlined above. The agency was not required to issue a standard mandating passive restraints—whether as provided in Standard 208 or as the majority would now have that standard amended. The majority's view arrogates to the judiciary the agency's statutory discretion to determine what regulatory proposals it should consider. That view is flatly contrary to the principles of primary jurisdiction long established by this Court.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed and NHTSA's order rescinding the passive restraint requirements of Standard 208 should be upheld.

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